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No. 83-36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS P. VANN and
JAMES E. MELHORN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari. Petitioners disagree with many of the facts stated by the Government. For example, the Government's contention that Petitioners reached a "firm agreement" (Govt. Br. at 2) to rig the two contracts cites to record testimony which is immediately preceded by the

statement that such an agreement was dependent on "if everything and everyone was contacted on this job the way we were supposed to do." (Trial Tr. at 96). Principally, however, Petitioners object to the Government's implication that the sufficiency of the evidence against them was not challenged. Petitioners did challenge the sufficiency of the evidence below. The only reason they did not here was because insufficiency of the evidence is not ordinarily a reason for granting certiorari.

I. THE SIXTH CIRCUIT'S DECISION IS INCONSISTENT WITH OHIO V. ROBERTS AND DECISIONS OF OTHER FEDERAL APPELLATE AND STATE SUPREME COURTS

(A) The Sixth Circuit's Decision Squarely Raises Important Confrontation Issues And Is Inconsistent With Ohio v. Roberts, 448 U.S. 56 (1980)

In its Brief the Government does not dispute that it did not establish in the District Court (1) that the co-conspirators were unavailable (2) that the challenged statements were only of peripheral importance or (3) that cross-examination would not be useful. Further, it does not dispute that the challenged statements constituted substantially all the proof as to 40% of the Government's case; that they played a substantial and important part of its Involuntary Bill of Particulars; that the prosecution relied on these statements to urge conviction of Petitioners; that these statements were admitted by the District Court for their truth under F.R.E. 801(d)(2)(E); and that the District Court admitted them on the theory that F.R.E. 801(d)(2)(E) was coterminous with the Confrontation Clause and satisfaction of it satisfied the Confrontation Clause. Furthermore, in its Brief the Government recognizes that under *Roberts* the Confrontation Clause places two constraints on the introduction of otherwise admissible hearsay (1) "in the

usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant . . . and (2) the evidence must satisfy certain indicia of reliability".

The Government's threshold argument apparently is that much of the evidence did not mention Petitioners by name and presumably therefore did not incriminate them. Even the Sixth Circuit assumed that much of the testimony incriminated Petitioners.[1] The District Court so stated.[2] The very purpose of introducing the evidence was to incriminate Petitioners, and the Government so argued to the jury.[3] The Government's position is untenable.

The Government's principal argument is that the Sixth Circuit did not rule on the Confrontation Clause at all (Br. at 6) or if it did, that it properly sanctioned the admission of the evidence under *Dutton* v. *Evans*, 400 U.S. 74 (1970). (Br. at 6-7).

Clearly, the Sixth Circuit did decide Confrontation Clause issues. It stated (Op. 9-10, Pet. App. 8a) that the testimony was admissible under either of two "rules":

(a) ". . . the federal co-conspirator exception automatically complies with the requirements of the Confrontation Clause . . ." or

(b) ". . . the declarant must be unavailable, unless the evidence is neither crucial to the prosecution nor devastating to the defendant. . ."

Both alleged rules involve issues under the Confrontation Clause. Both Petitioners and Amicus point out the long history culminating in *Roberts* under which the Confrontation Clause has been held not to be coterminous with the hearsay

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[1] *See* Op. at 9 (Pet. App. 7a).

[2] *See* Trial Tr. 120-121 (Pet. App. 18a-19a).

[3] Trial Tr. 931-932, 1026.

rule.[4] The Government does not deal with this issue. By its silence, the Government concedes, as it must, that the Sixth Circuit was in error in this conclusion. Since it was one of the bases on which the Sixth Circuit affirmed the decision below, this alone requires reversal, or at least deserves clarification by the Supreme Court.

The Government's main argument is that *Roberts* only requires a showing of unavailability in the "usual case." The implication is that this is not the usual case and that the Sixth Circuit properly admitted the evidence under its alternate standard quoted in (b) above. In the first place, this standard is erroneous. In *Roberts*, the Court carved out a careful and narrow exception based on whether the "utility of confrontation" is as remote as it was in *Dutton*.[5] This is discussed in detail in the Amicus Brief at 9-13.[6] But even if the Sixth Circuit's alternate standards were correct, there is no proof or finding below that this was the situation in this case. In this case the evidence was admitted on the theory that satisfaction of 801(d)(2)(E) satisfied the Confrontation Clause. The District Court told Petitioners to take the issue to the Supreme Court if they felt otherwise. As an afterthought, the Government, in the Court of Appeals, raised the question of whether production of the co-conspirator could be excused on the basis of an exception to *Roberts*. The Government apparently takes the position that it has carte blanche to avoid the teachings of *Roberts* after the fact and without any restrictions. This case thus raises questions as to the scope of the exception, which party has the burden of proving it, and

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[4] Pet. at 10-11, Amicus National Ass'n of Criminal Defense Lawyers ("Amicus") Br. at 5-8.

[5] Contrary to the Government's argument, Petitioners do not contend that *Roberts* reversed *Dutton*, but rather that *Roberts* re-emphasized to the lower courts that *Dutton* involved a very unique factual matrix.

[6] *See also*, Pet. at 10, 13-14.

what, if any, record is required in the District Court to support it.

The Government's argument that there is no reason for the Supreme Court to rule on the interrelationship between *Roberts*, *Dutton*, and the co-conspirator hearsay rule is without merit.[7]

(B) The Sixth Circuit's Decision Conflicts With Other Appellate and State Supreme Court Decisions

While the Third Circuit's unpublished orders in *United States* v. *Gibbs*[8] setting that case for an *en banc* rehearing postpones until the *en banc* decision the existence of a clear conflict between *Gibbs* and this case, those orders demonstrate the need for guidance to the lower courts on the interplay between the Confrontation Clause and F.R.E. 801(d)(2)(E). The Third Circuit's current indecision exemplifies that the question here presented is of general importance and substantial legal merit.

And, while *Gibbs* most clearly conflicts with the Sixth Circuit's decision here, the Government's contention that no other decision does is simply incorrect.

In *United States* v. *Perez*, 658 F.2d 654, 661 (9th Cir. 1981), the court held (with *Roberts*) that unavailability need not be shown where the "utility of trial confrontation is remote",

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[7] The Government quotes from *Roberts* that "*reliability* can be inferred . . . where the evidence falls within a firmly rooted hearsay exception." (Br. at 8). As the Government concedes, *Roberts* states that both unavailability and reliability must be shown. Indeed, under *Roberts*, reliability issues are not addressed until *after* the unavailability issue is addressed: "The second aspect [reliability] operates once a witness is shown to be unavailable." 448 U.S. at 65. Such a suggestion reads half of the *Roberts* test out of existence.

[8] 703 F.2d 683 (3rd Cir. 1983).

and in dicta said that non-crucial, non-devastating testimony "*might* not" be subject to the *Roberts* rule. The court did not hold that unavailability need not be proved where the co-conspirators' statements are neither crucial nor devastating. Subsequent Ninth Circuit decisions have noted that "crucial v. devastating" is at most a factor relating to the reliability prong of *Roberts* and that it is a factor whose "relevance [has been] debated" even there.[9]

In *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), the Fifth Circuit held that *Roberts* "resolved" the issue of the Confrontation Clause and the co-conspirator exception, thus making its task "considerably easier" by reference to the two-prong *Roberts* test. In so doing, it pointed out that the unavailability prong was satisfied — the witnesses were dead. The Fifth Circuit's pre-*Roberts* cases cited by the Government are irrelevant. Whatever the rule before *Roberts*, the Fifth Circuit's rule now is that production or an unavailability showing is a Confrontation Clause predicate to admissibility under F.R.E. 801(d)(2)(E).

Finally, in *People* v. *Dement*, 661 P.2d 675, 679-682 (Colo. 1983), that state's Supreme Court held that Colorado's Sixth Amendment counterpart was violated because, applying *Roberts*:

> The prosecution failed to carry *its burden* to produce the hearsay declarant for cross-examination or to establish her unavailability. . . . [D]efense counsel had several legitimate areas of inquiry to explore on cross-examination. . . . This is not a case where the utility of trial confrontation is remote. Compare this case with *Dutton* v. *Evans*, *supra*.[10]

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[9] *United States* v. *McKinney*, 707 F.2d 381, 384 n.5 (9th Cir. 1982); *United States* v. *Fleishman*, 684 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982).

[10] 661 P.2d at 681-682 (emphasis added).

Thus, for all the same reasons why the Sixth Circuit's decision conflicts with *Gibbs*,[11] it conflicts with *Dement*.

II. THIS CASE RAISES IMPORTANT QUESTIONS AS TO THE PROPRIETY OF THE SIXTH CIRCUIT'S INTERPRETATION OF F.R.E. 404(b)

(A) This Is Not A Fact-Specific Case And This Court Should Set Standards For The Admission Of Evidence Under Rule 404(b)

The Government's first argument is that all the Sixth Circuit did was to rule on the District Court's proper use of its discretion. The argument is ludicrous. The Court of Appeals established a rule of law for the admission of bad act testimony in *per se* Sherman Act cases – by asserting a "lack of agreement defense, Appellants put intent to agree in issue" (Op. at 8, Pet. App. 6a) and that 404(b) testimony was thereby admissible on the issue of "intent to agree." The Sixth Circuit used this rule to justify the admission of this testimony in this case, and that rule results in the admission of such testimony in every *per se* Sherman Act case.

This standard was expressly rejected by the District Court on the basis that it would permit the introduction of evidence of propensity in direct violation of the first sentence of Rule 404(b).[12] The Sixth Circuit not only did not affirm the exer-

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[11] Pet. at 10-12, 14.

[12] The Government argues that the Sixth Circuit properly affirmed the trial court for reaching the right result for a wrong reason. (Govt. Br. at 10 n. 10). None of the cases cited, however, hold that an appellate court can rest its decision on a ground which the district court expressly rejected. They simply hold that an appellate court can affirm the admission of evidence on a ground that the district court did not consider. In any event, this rule has not been universally applied in Rule 404(b) cases. *See United States* v. *Pantone*, 609 F.2d 675, 682 (3rd Cir. 1979). Its wisdom is dubious. Inevitably, the evi-

cise of the District Court's discretion, it reversed the very exercise of that discretion by the District Court. By no stretch of the imagination are Petitioners presenting an abuse of discretion issue nor is it presented by this record.

In any event, the recurrence of Rule 404(b) issues and the conflict in the cases arising from the absence of any uniform standard for admitting such evidence requires this Court to provide such guidance.[13] The Government does not contest that this Court has provided such standards as to prior, analogous issues.[14]

(B) This Court Should Define The Proper Relation Of Rule 404(b) And The Issue Of "Intent" In A Per Se Sherman Act Prosecution

The Government's principal argument is that Petitioners' denial of the agreement to rig bids put intent to agree in issue and that the bad act testimony was thereby admissible under the second sentence of Rule 404(b).[15] Petitioners concede that this was the Sixth Circuit's position. However, the decision deserves review for all of the reasons stated in the Petition and in the Amicus Committee Brief. These include the facts that: under this theory, uncharged bad acts will be admissible in all *per se* Sherman Act cases because the denial of agreement is the only defense;[16] in no prior *per se* Sherman

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dence is submitted to the jury under instructions which are inapplicable and the jury is not instructed on the ground sanctioned by the appellate court.

[13] *See* Amicus Committee of Criminal Antitrust Defense Counsel ("Amicus Committee") Br. at 5-8.

[14] *E.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981).

[15] Govt. Br. at 8-9.

[16] Pet. at 20, Amicus Committee Br. at 9-10. Indeed, in *per se* cases, good motives or innocent intent do not preclude a conviction for having agreed. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S.

Act case has such testimony been held admissible to show 'intent to agree';[17] in several prior Sherman Act cases, and in the District Court here, such testimony was held *inadmissible* to show intent;[18] Petitioners at trial expressly disavowed an intent-based defense;[19] the Sixth Circuit's interpretation of the Rule completely reads out the first sentence of that Rule prohibiting the introduction of propensity evidence;[20] and, under the Sixth Circuit's standard, contrary to the standards in other circuits, bad act testimony is admissible regardless of the extent to which intent to agree is either a disputed issue or more than a nominal issue inferable from proof of the criminal act.[21] Nowhere in its Brief are these issues addressed by the Government.

150, 221-223 (1940); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-294 (2nd Cir.), *cert. denied*, 454 U.S. 1083 (1981); *Continental Baking Co.* v. *United States*, 281 F.2d 137, 144 (6th Cir. 1960) ("Once the defendant admits the agreement, he may say no more for it is illegal per se".)

[17] Pet. at 19-20.

[18] Pet. at 20, 23-24, Amicus Committee Br. at 12 n.22, 13.

[19] Pet. at 18-19, Pet. App. 24a-26a. This express disavowal of an intent-based defense renders misleading the Government's unsupported suggestion (Br. at 9 n.9) that Petitioners were claiming that they had an innocent intent when they were present at various meetings.

[20] Pet. at 20-23; Amicus Committee Br. at 10. The Government's contention (Br. at 9 n.8) that it did not offer the testimony to prove Petitioners' propensity to conspire fails to address that the prosecutor told the District Court that he wanted to use such testimony to prove that Petitioners "did in fact . . . agree" to the charged conspiracy. Pet. App. 27a. It also overlooks that the prosecutor summed up the significance of the bad act testimony to the jury as follows (Trial Tr. 838): "Just as in dividing up contracts 8148 and 8175, Vann and Melhorn's plan was always to split the work with the closest competitor by means of bid rigging. This is just what they did in this case."

[21] Pet. at 16-19, Amicus Committee Br. at 5-8.

As the District Court pointed out, proof of prior Sherman Act agreements to prove intent to agree is tantamount to using one criminal agreement to prove another criminal agreement. This is exactly the conduct prohibited by the first sentence of 404(b). Nowhere does the Government address the inherent potentiality to prove propensity from this process. Instead, it hides behind the "intent" label,[22] making no effort to address this Court's implicit recognition in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443 and n.20 (1978) that 'intent to agree' is so intimately tied up with the act of agreement itself that it is best addressed in that context.[23]

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[22] The Government does not explain how the Sixth Circuit's decision can be squared with the rule in several circuits that a mere denial of the act part of the crime raises no genuine issue of intent and therefore bad act testimony is inadmissible. *See* Pet. at 16-19. Its citation to *United States* v. *Park*, 421 U.S. 658 (1975) adds nothing. *Park* did not involve Rule 404(b), much less an issue about 'intent', and in *Park* the defendant had taken the stand in his own defense, unlike the instant case. Nor does the Government's reference to the Petitioners' counsel's peripheral mention to 'mere presence' change the result. For the Sixth Circuit, it was enough that Petitioners denied the agreement. The fact that Petitioners argued that they were merely present is wholly consistent with their main claim of denying the agreement, and the jury here was so instructed. (Trial Tr. 1083). The Government views a 'mere presence' claim as being tantamount to admitting "unlawful conduct" but denying the intent to engage in such conduct. (Br. at 9 and n.9). But it is settled law that mere association with bad actors is neither unlawful nor is it even evidence of a conspiracy, standing alone. *See* American Bar Ass'n Section of Antitrust Law, *Jury Instructions In Antitrust Cases 1964-1976*, at 46, 48, 51, 55-56, 62, 65, 72-73, 75 (1978) (reprint of actual jury instructions in prior cases).

[23] *See* Pet. at 20-22, Amicus Committee Br. 10-12, LaFave and Scott, *Criminal Law* at 464-465 (1972); *United States* v. *Bensinger Co.*, 430 F.2d 584, 594 n.4 (8th Cir. 1970). Contrary to the Government's belief (Br. at n.10), no one here suggests that 'basic intent to agree' has no place in *per se* cases. Instead, it is contended that such intent is not a proper subject on which uncharged bad act

The Government's failure to address the issues simply confirms the need expressed in the Petition and Amicus Committee Brief to review whether, under Rule 404(b), basic intent to agree is an issue on which bad act evidence is admissible and, if so, under what circumstances.

III. THE DENIAL OF PETITIONER VANN'S SIXTH AMENDMENT RIGHT TO CONSULT WITH COUNSEL REQUIRES REVIEW

The Government apparently concedes that Vann has a Sixth Amendment right to consult with his counsel during his appeal and that he could not exercise it. It condones the Sixth Circuit's interference with this right because "the court had no obligation to hear oral argument at all." (Govt. Br. at 12). This is only an attempt to trivialize Constitutional rights. Oral argument had been scheduled before counsel requested a stay based on Vann's comatose condition. Once the state extends a privilege to its citizens, it may not condition the exercise of that privilege to a class of indigent or handicapped persons on their sacrifice of Constitutional rights.[24] Nowhere does the Government explain how it is that criminal prosecutions in district courts cannot go forward when the accused is mentally incapable of consulting with counsel, but that the same Sixth Amendment rights can be shunted aside when the accused is similarly afflicted on appeal.

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testimony is admissible, at least not where the defense is simply a flat denial of agreement, because such intent follows as a necessary inference from proof of the agreement itself.

[24] *Mayer* v. *City of Chicago*, 404 U.S. 189, 193-194 (1971); *Burns* v. *Ohio*, 360 U.S. 252, 257 (1959) ("Once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty."); *Griffin* v. *Illinois*, 351 U.S. 12, 17-19 (1956).

The Government argues that because Vann's "Sixth Amendment rights were protected fully by his representation throughout the appeal" by his counsel (Govt. Br. at 10), there was no Constitutional violation. This confuses Vann's right to counsel with his right to consult with counsel. Satisfaction of the former does not suffice for compliance with the latter, because (as this Court has recognized) an "assistant, however expert, is still an assistant."[25] No prejudice need be shown when the counsel provision is violated.[26] In any event, Vann could very well have meaningfully contributed to preparation for oral argument, even though the briefs had been filed.[27]

Finally, the Government claims that Vann did not raise the issue in the Sixth Circuit. This is incorrect. The motion papers accompanying the initial request for an extension and the motion papers seeking an extension on the oral argument specifically raised the Constitutional error that would result from proceeding during Vann's incapacity to consult. Any failure to re-raise the Constitutional argument before filing the Reply Brief cannot now bar the Court's consideration of how courts of appeal are to guarantee Sixth Amendment rights when a criminal case appellant becomes comatose during the pendency of his appeal.[28]

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[25] *Faretta* v. *California*, 422 U.S. 806, 820 (1975).

[26] *Glasser* v. *United States*, 315 U.S. 60, 75 (1942).

[27] Sixth Circuit Rule 7(e) recognizes that oral argument "should undertake to emphasize and clarify the written argument"; it clearly is not intended to be a rehash of the briefs. *See also*, Supreme Court Rule 38.1.

[28] *See* Fed. R. Crim. Proc. 52.

CONCLUSION

For all of the reasons stated above and in the Petition and Amici Briefs, this Court should review the decision of the Sixth Circuit.

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